MOTION.

F. G. Pooley for the plaintiff.

T. E. Conaghan for the defendants.

Jobling, J. : — This matter came before the Court on a Motion for an order for specific performance of the terms of a compromise agreed upon by the parties in settlement of this action for damages for libel.

It appeared from the affidavits filed that the defendants agreed to publish an apology on certain terms and to pay $500/- to named charities. It was not specifically stated but was implied that the apology was to be published in the "Straits Echo" in Penang and the plaintiff does not dispute this.

The defendants subsequently found that it was impossible to publish the apology because some 41 members of their staff tendered their resignations as soon as it was known that it was intended to publish an apology and without their assistance the whole issue of the newspaper would be stopped.

Mr. Conaghan for the defendants submitted the proceedings by way of Motion were misconceived and that separate proceedings were necessary to enforce a compromise. It appears clear however that although this was the former practice a compromise may now be converted into an order of Court upon a Motion in proceedings pending before the Court and enforced like a judgment. (See Daniel's Chancery Practice, Vol. 1, page 646 and *In re Gaudet Freres Steamship* there cited).

In my opinion therefore these proceedings are in order.

Mr. Pooley for the plaintiff asked the Court to order the specific performance of the agreement notwithstanding the alleged impossibility and said plaintiff would agree to the publication of the apology in the "Straits Times".

After an adjournment to take instructions Mr. Conaghan said defendants did not authorise publication in the "Straits Times", they took up the position that they had agreed to publication in the "Straits Echo" and as that was impossible the action must go on.

Mr. Pooley for the plaintiff asked the Court to order publication in the "Straits Times".

The two points for decision were therefore whether the Court should order specific performance of the compromise as it stood and if not, whether it should disregard the agreement to publish in the "Straits Echo" and order the apology to be published in the "Straits Times".

It is an obvious and well-established rule that the Court will not make an order which it cannot enforce. The defendants had a complete answer to the order asked for and as the defendants' staff are not parties to these proceedings they could not be ordered to publish the newspaper.

The probability that an order to publish the apology would not be carried out was clear and in that event there would be no way of enforcing it. In these circumstances the order for specific performance of the compromise as it stands was refused.

As regards the submission that publication in the "Straits Times" should be ordered I think this amounts to a suggestion that I should amend the terms of the compromise to enable me to order its performance. It is true that the agreement to publish in the "Straits Echo" is a subsidiary term of the compromise and the main purpose of the parties would be given effect to by publication in the "Straits Times". But I considered it would be a dangerous precedent to interfere with the terms of an agreement in order to enforce it and I know of no authority for doing so. I was therefore unable to agree with the suggestion.

Motion refused with costs.

Motion dismissed.

THAKURDAS KESSAMALL v. WASSIAMULL ASSOMULL & CO.

[Court of Appeal (Murray-Aynsley, C.J., Abbott, Ag. C.J. (F.M.) and Rogers, J.) November 1, 1951]

[Singapore — Civil Appeal No. 7 of 1951]

Landlord and Tenant — Control of Rent Ordinance, s. 14(1)(f) — Recovery of possession — Hardship — Comparative hardship — Finality of decision of trial Judge.

This appeal arose out of an action by the landlord (appellant). The tenant relied on the protection of the Control of Rent Ordinance, section 14(1)(f). At the trial the learned Judge found that the tenant had made out a case of greater hardship and refused possession. The landlord appealed.

Held, that the assessment of the extent of the hardship on both sides is exclusively a matter for the judge at first instance. Appeal dismissed.

The facts and arguments appear sufficiently from the judgment of Brown, Ag. C.J.

Coplans v. King[1] applied.

Cases referred to :—

(1) *Coplans v. King* (1947) 2 All E.R. 393.
(2) *Chandler v. Strevett* (1947) 1 All E.R. 164.
(3) *Robinson v. Donovan* (1946) 2 All E.R. 731.

CIVIL APPEAL.

S. H. D. Elias for the plaintiff-appellant.

K. A. Seth for the defendants-respondents.

Cur. Adv. Vult.

Brown, Ag. C.J. : — The premises which are the subject of this action are at No. 74 High Street, which the defendants now hold as statutory tenants paying to the plaintiff a monthly rent of $312.50. In asking for an order for possession the plaintiff relies upon section 14(1)(f) of the Control of Rent Ordinance, 1947. The onus is upon the plaintiff to prove that the premises are reasonably required for occupation by himself or any member of his family. If he can prove that, then the burden is upon the defendants to prove that having regard to all the circumstances of the case, including the question whether other accommodation is available for the plaintiff or for the defendants, greater hardships will be caused by granting an order for possession than by refusing it.

The plaintiff has for many years had a retail business of textiles and sundry goods at 48/50 North Bridge Road. In August 1937 he purchased No. 74 High Street. He made this purchase in order to carry on a wholesale textile business, which he carried on until May 1942, when he had to close it down during the Japanese Occupation for lack of stock. Before the war he used the ground floor for the wholesale business, the first floor for his carpet department, and he lived on the top floor with his wife and three children and ten or twelve salesmen. In May 1942 he let 74 High Street to the defendants at a rent of $250 a month. There is some conflict of evidence whether the plaintiff, his wholesale business at 74 High Street being at a standstill, approached the defendants in the matter and was pleased to receive a rent of $250 a month in place of a moribund business, or whether the defendants, their own premises at 31/33 High Street having been bombed, asked the plaintiff to assist them in their difficulty. I do not attach much importance to this point. Having let No. 74 to the defendants, the plaintiff went to live at No. 3 Wilkie Terrace, and that is where he is living now. He is living there with his wife and three children (two of whom are daughters aged 16 and 14) and four salesmen. The latter sleep in the drawing-room, and when the family go out at night they have to go through the drawing-room past the sleeping salesmen. The hardship which the plaintiff is suffering from being deprived of his premises at 74 High Street is thus both domestic and commercial. He is compelled to dwell in cramped conditions. And he is precluded from carrying on his wholesale business. One of the points made on behalf of the defendants is that their wholesale business is a going concern, and the plaintiff's has ceased to exist. But during the Japanese Occupation and since the plaintiff has been making constant efforts to recover possession of his premises, which the defendants have promised to vacate as soon as they could obtain other accommodation in the upper part of High Street, and if the plaintiff had been successful in recovering possession of his premises immediately after the Occupaion he too might now have a flourishing wholesale business in the centre of the wholesale trade in the premises of which he is the owner. It is in evidence that before the war 80% of his profits came from his wholesale business at 74 High Street and only 20% from his retail business in North Bridge Road. It is also in evidence that in his efforts to recover possession of his premises he has endeavoured to find alternative accommodation for the defendants at 77 High Street and at another set of premises in High Street, neither of which were acceptable.

The defendants have convinced me that much hardship will result to them in their business if an order for possession is made. It is not easy to compare the hardship which the plaintiff is suffering with the hardship which the defendants would suffer. On the domestic side all the hardship falls on the plaintiff. On the commercial side the comparison is difficult. The plaintiff, in business, is a small man compared with the defendants. The defendants are in a considerable way of business. They have twelve branches outside Singapore. Their branches in London, Milan, Tokyo and Bombay are buying offices, where textiles are bought mainly to send to 74 High Street, Singapore. Their branches in Colombo, Calcutta, Manila and Hong Kong operate as trading concerns, both as importers and exporters. Their branches at Batavia and Sourabaya also operate as importers and exporters, but they depend on 74 High Street, Singapore, for their supplies. Of this consideration world-wide business 35%-40% of the profits come from 74 High Street, Singapore, and some idea of the importance of these premises in Singapore may be obtained from the fact that the estimated profit from these premises for the year 1950 is over $500,000. Mr. D. T. Assomull, who manages the defendants' business in Singapore, was cross-examined by Mr. Mallal on behalf of the plaintiff with a view to establishing that premises in the lower part of High Street, where they now carry on a retail business at

Nos. 31, 33 and 35 High Street, would be equally suitable for carrying on the wholesale business. But Mr. Assomull has convinced me that this would not be so. Apart from the fact that to transfer his wholesale business to the premises now occupied by his retail business would mean the displacement of his retail business (unless alternative accommodation can be found for that), I accept Mr. Assomull's view that the upper part of High Street is now the recognised centre of the wholesale textile trade in Singapore and that if he moves 200 yards down the street his wholesale business will be very considerably diminished, if it is not lost entirely. Moreover, in considering the absence of alternative accommodation for the defendants' business, I must have regard to all factors which are ancillary to their business. One of these factors is the defendants' employees of whom there are thirty-five at 74 High Street, of whom twenty-eight live upon the premises. All the wholesale business is conducted upon the ground floor. Twelve employees live on the first floor, which accommodates a kitchen to feed the whole staff of thirty-five. Eight members of the staff live on the second floor. Another eight live on the top floor, which is also used as a guest house for business clients from abroad (which is another factor to be taken into account).

I have first to consider whether it is reasonable that the plaintiff should require 74 High Street for occupation by himself or any member of his family. I do not think that this question presents any difficulty. In my opinion it is reasonable for a man who is living with his wife and three children, with four salesmen sleeping in the living-room, to require possession of his own premises, where he can live with his family without four salesmen sleeping in his living-room. The difficulty in this case lies in the next question : upon whom will the greater hardships fall? If I make an order the defendants will be deprived of the premises on which they are conducting their wholesale business. If I refuse to make an order the plaintiff will continue to be deprived of the opportunity of resuming his wholesale business on the premises which he owns. I have to balance the two hardships, and to bear in mind that there is also hardship to the plaintiff on the domestic side.

I am indebted to Mr. Seth, who appears for the defendants, for the assistance which he has given to me in drawing up a clear and fair "notional balance-sheet" containing the several items of the respective hardships on both sides. This "balance-sheet" appears fully in the record of his final speech, and it is unnecessary to set it out again here. I accept it, as I understood Mr. Mallal to accept it, and it is my endeavour to give due weight to each and every item which it contains on both sides. But there is an item on the defendants' side of the "balance-sheet" which, though it may be implied in item (2) ("Defendants' business is a going concern"), was not stated by Mr. Seth in express terms. I refer to the defendants' employees, who form a factor in the defendants' business. And in considering the question of whether alternative accommodation is available for the defendants' business, the evidence regarding the defendants' employees must be taken into account in determining on which side the greater hardships lie.

The plaintiff is the owner of the premises. Domestic hardship falls on the plaintiff and his family by being kept out of his premises. He is precluded from resuming what might well be a lucrative business in the centre of the wholesale textile trade. He has taken every reasonable step to recover his premises. I assume that he did not take legal proceedings before because he lived in the hope that the defendants would find suitable alternative accommodation. But when I consider the extent of the disruption of the defendants' business, the scale of the financial loss which would result, the fact that thirty-five persons are employed in the business of whom twenty-eight live upon the premises, I am compelled to the conclusion, that, balancing the two hardships, the defendants have established that the greater hardship would fall on them.

There must be judgment for the defendants with costs.

The plaintiff appealed.

The judgment of the Court of Appeal was delivered by Murray-Aynsley, C.J. with which Abbott, Ag. C.J. (F.M.) and Rogers, J. concurred.

Murray-Aynsley, C.J. : — This appeal arises out of an action for possession by a landlord. The tenant relies on the protection of the Control of Rent Ordinance (No. 25 of 1947). The relevant part of the Ordinance in this case is section 14(1)(f). In the circumstances the landlord was entitled to possession unless the tenant could show greater hardship within the meaning of the proviso. At the trial the learned Judge found that the tenant had made out a case of greater hardship and refused possession. The landlord appeals.

At the outset the question arises as to the position of a Court hearing an appeal in cases of this kind.

In a previous case this Court had applied the ruling of the Court of Appeal in England in *Coplans v. King*[1]. In this case counsel for the appellant contended that that ruling was based, not on the interpretation of the English Act, which is identical in its terms with the local Ordinance, but on the restriction on the powers of the Court of Appeal imposed by the County Courts Acts 1934. It is true that Scott, L.J., in the dicta in the case of *Chandler v. Strevett*[2], referred to that Act, but it seems to me that the judgments in the later case do not depend on that Act, but merely on consideration of the terms of the relevant section of the English Rent Acts. I consider, therefore, that this Court should continue to apply the ruling in *Coplans v. King*[1] to cases of this kind. Lord Greene, M.R., said in that case at p. 394, "If in a case there is evidence of hardship on one side and none on the other, the County Court Judge can come to only one conclusion, and. if he finds hardship where the facts are not sufficient to constitute hardship in law.... he makes an error in law, but, once there is evidence which in law can amount to hardship on two sides, Parliament has deliberately made the County Court Judge the conclusive judge of the fact which is the greater hardship". In *Robinson v. Donovan*[3] Scott, L.J. said: Under the Act (obviously the Rent Act) the judge is the final arbiter.

With that ruling in mind it is necessary to consider the facts of the present case. It should be noted that the local Ordinance applies to business as well as to residential premises and therefore, in this Colony, it is necessary to consider kinds of hardship which do not trouble the Courts in England. In the present case the premises are substantially used for business purposes. They are only residential to the extent that a considerable number of employees are boarded there. I think that the commercial aspects of the case are predominant. The tenants use the premises for conducting a wholesale textile business. They are a very rich and very important firm. The learned Judge accepted the evidence on behalf of the tenants that the carrying on of their business depended on the occupation of premises in the upper part of High Street where they now are. He found that if they moved 200 yards down the street their wholesale business would be very considerably diminished, if it were not lost entirely. The learned Judge appears to have considered that no suitable alternative accommodation was available. If it is possible for the rich to suffer hardship, and I suppose that they can, it seems that the tenants would suffer hardship if the landlord were given possession. It is admitted that the landlord would suffer hardship if refused. On the commercial side he would lose the opportunity of reviving a wholesale business which he was forced to discontinue in 1942. The assessment of the extent of the hardship on both sides is exclusively a matter for the Judge at first instance. I do not think that this Court can interfere with his assessment and this appeal must be dismissed with costs.

Deposit to be paid out to respondents.

Appeal dismissed.

Re LEO HOON HONG;

Ex parte THE MUNICIPAL COMMISSIONERS OF THE TOWN AND PORT OF MALACCA.

[Orig. Civ. Juris. (Abbott, J.) November 5, 1951]

[Malacca — Bankruptcy No. 2 of 1951]

Bankruptcy Ordinance (Cap. 45), s. 3(1)(i) — Bankruptcy Notice — Judgment to pay Costs of the Proceedings — Whether final judgment.

One Leo Hoon Hong took proceedings against the Municipal Commissioners of Malacca; Judgment was given against him and he was ordered to pay costs of the proceedings taxed at $3,320. He was unable to pay this amount. The Municipal Commissioners of Malacca applied to Court for issue of a Bankruptcy Notice under section 3(1)(i) of the Bankruptcy Ordinance (Cap. 45).

Section 3(1)(i) reads as follows:—

"The debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount and execution thereon not having been stayed has served on him in the Colony, or by leave of the Court elsewhere, a bankruptcy notice under this Ordinance with the terms of the judgment dealt in accordance with the terms of the judgment.....and he does not within seven days after service of the notice .....either comply with the requirements of the notice....."

Held, that an order for payment of Costs is not a final judgment, and therefore, this application, not being founded upon a final judgment, cannot succeed. Application dismissed.

BANKRUPTCY.

Municipal Secretary, Malacca, for Municipal Commissioners-Applicants.

Leo Hoon Hong — debtor in person.

Cur. Adv. Vult.

Abbott, J. : — This is an application by the Municipal Commissioners of the Town and Fort of Malacca for the issue of a bankruptcy notice upon one Leo Hoon Hong. Leo Hoon Hong took certain proceedings in the High Court against the Municipal Commissioners; judgment was given against him and he was ordered to pay the costs of the proceedings taxed at $3,320. He has not paid the costs and, in this Court, he declared his inability to do so. This